



TC02355

Appeal number: TC/2012/06824

TYPE OF TAX – appeal against the penalty imposed for the late payment of PAYE- Schedule 56 Finance Act 2009—whether insufficiency of funds was a reasonable excuse for the late payment – no- specifically excluded by paragraph 16 of Schedule 56 – whether the penalty disproportionate – no it was as laid down by the legislation – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

A T HARRIS T/A C R MANAGEMENT

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE SANDY RADFORD
ANTHONY HUGHES**

Sitting in public at Bedford Square, London on 14 September 2012

Mr Farnell for the Appellant

Mr P Reeve, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against the penalty of £5,712.16 imposed by HMRC for the late payment of PAYE during the tax year 2010/11.

The legislation

2. Penalties for the late payment of monthly PAYE amounts were first introduced for the tax year 2010/11. The legislation is contained in Schedule 56 to the Finance Act 2009 (“Schedule 56”). Schedule 56 covers penalties for non- and late payment of many taxes: paragraph 1(1) (which applies to all taxes) states that a penalty is payable where the taxpayer fails to pay the tax due on or before the due date.

3. Paragraph 6 (which relates only to employer taxes such as PAYE) states that the penalty due in such a case is based on the number of defaults in the tax year, though the first default is ignored. The amount of the penalty varies as provided by subparagraphs (4) to (7):

(4) If P makes 1, 2 or 3 defaults during the tax year, the amount of the penalty is 1% of the amount of tax comprised in the total of those defaults.

(5) If P makes 4, 5 or 6 defaults during the tax year, the amount of the penalty is 2% of the amount of tax comprised in the total amount of those defaults.

- (6) If P makes 7, 8 or 9 defaults during the tax year, the amount of the penalty is 3% of the amount of tax comprised in the total amount of those defaults.

(7) If P makes 10 or more defaults during the tax year, the amount of the penalty is 4% of the amount of tax comprised in those defaults.

- In this and other paragraphs of Schedule 56 “P” means a person liable to make payments.

4. Under paragraph 11 of Schedule 56 HMRC is given no discretion over levying a penalty:

11(1) Where P is liable to a penalty under any paragraph of this Schedule HMRC must –

- (a) assess the penalty,
(b) notify P, and
(c) state in the notice the period in respect of which the penalty is assessed.
- (3) An assessment of a penalty under any paragraph of this Schedule—
- (a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Schedule),
(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

5. Paragraphs 13 to 15 of Schedule 56 deal with appeals. Paragraph 13(1) allows an appeal against the HMRC decision that a penalty is payable and paragraph 13(2) allows for an appeal against the amount of the penalty. Paragraph 15 provides the Tribunal's powers in relation to an appeal which is brought before it:

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may-

10 (a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had the power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9-

15 (a) to the same extent as HMRC...[...],or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

6. Paragraph 9 (referred to in paragraph 15) states:

20 (1) If HMRC think it right because of special circumstances, they may reduce the penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include –

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

25 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to-

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

7. Paragraph 16 contains a defence of reasonable excuse, but an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control. Nor is it such an excuse where P relies on another person to do anything unless P took reasonable care to avoid the failure; and where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse has ceased.

Background and facts

8. The appellant is a partnership which was previously run by Alan Harris and his wife. On 1 April 2009 Mr Farnell bought into the partnership. In the first year two of their clients went into receivership owing £78,000. The appellant now banks with
5 HSBC and factors their invoices. HSBC provides 80% on receiving the invoice and the appellant cannot borrow money from anyone else. As a result of the clients who went into receivership HSBC clawed that money back. The PAYE payments were therefore made late, but only a few days late, because of the cash flow.

9. The appellant gives contractual advice to construction companies and consists
10 mainly of quantity surveyors.

10. Mr Farnell stated that Mrs Harris had now left the business and effectively his joining on 1 April 2009 had been a new start-up.

11. He stated that both Mrs Harris and their previous agent had not been pulling their weight. They had a new agent now and were paying on time. Instead of relying
15 on one single client they now had 30 or 40 a month.

Appellant's submissions

12. Mr Farnell submitted that the Tribunal ought to consider the proportionality of the penalty as the payments were made only a few days late whilst other tax payers made payments which were far later yet paid the same penalty.

13. He submitted that once he took over the cash flow had improved and the bad
20 debts were far fewer.

14. The appellant submitted that in line with the case of *Dudman Group Limited* [2011] UKFTT 771 (TC) denying the appellant's appeal on the grounds that cash fluctuations in the appellant's business were neither isolated nor unusual should not
25 be applicable. Similarly to the *Dudman* case the appellant had already exercised reasonable foresight and due diligence by having the HSBC factoring facility in place in order to do all the appellant could to collect amounts due to it. It was therefore the appellant's assertion that it could not avoid the insufficiency of funds that led to the comparatively brief periods of default.

HMRC's submissions

15. Mr Reeve submitted that almost all the PAYE payments were made late and this was accepted by the appellant.

16. He submitted that paragraph 16 (2) of Schedule 56 specifically excluded cash flow as a reasonable excuse unless such cash flow was outside the appellant's control.

17. He submitted that the appellant had paid its PAYE late in previous years and so
35 nothing had changed in their behaviour. He therefore submitted that the alleged cash flow problem had not changed things.

18. Mr Reeve referred to the case of *Rodney Warren & Co* [2012] UKFTT 57 (TC) in which Judge Hellier stated at paragraph 45

5 “But in order for an event to exculpate a taxpayer from a default it must a reasonable excuse ‘for’ the default: in other words there must be a causal link between the event and the default. In this case that link did not seem to be present because in the previous year where there had not been the additional delay in payment by the Legal Services Commission the appellant had been late in payment.”

19. Mr Reeve referred to paragraph 6 of the *Dudman* case in which Lord Donaldson’s judgement in the Court of Appeal in the leading case of *Customs and Excise Commissioners v Steptoe* [1992] STC 757 was quoted:

15 “If the exercise of reasonable foresight and due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the tax payer may well have a reasonable excuse for non-payment, but that excuse would be exhausted by the date of which such foresight, diligence and regard would have overcome the insufficiency of funds.”

20. Mr Reeve submitted that the factoring did not cause the appellant to pay late because they had been paid late anyway.

21. He submitted that a penalty warning notice had been issued on 28 May 2010 although there was no legal requirement on HMRC to issue the warning. Additionally the new penalty regime had been advertised extensively in various Employer Bulletins and on the HMRC website. HMRC had phoned the appellant on various occasions and Mr Reeve produced a record of these calls.

22. Mr Reeve submitted that proportionality was not a reasonable excuse for making late payments of PAYE. The legislation had been made by Parliament and it was not for the Tribunal to challenge the legislation because such a challenge was a matter for judicial review.

23. He submitted that the penalty was based on a percentage of the amount of the PAYE which was paid late. The percentage rate of the penalty increased with the number of defaults so Mr Reeve submitted that it was fair and proportionate in any case.

Findings

24. The Tribunal found that in accordance with the legislation the penalty had been correctly charged.

35 25. The Tribunal found that they appellant had no reasonable excuse as insufficient funds are specifically excluded as a reasonable excuse by the legislation unless there is an event outside the appellant’s control that caused it.

26. The Tribunal considered whether the fact that two of the appellant’s clients went into receivership owing £78,000 was a factor outside the appellant’s control but

the Tribunal found that as in the previous two years the appellant had hardly ever paid on time, this was the most likely reason for the late payments that are the subject of the appeal.

5 27. The Tribunal found that as in the past three years the appellant had only paid on time on four occasions it was unlikely that the cash flow had changed things very much.

28. The Tribunal found that the penalty was not disproportionate as it had been imposed in accordance with the legislation which increased the penalty according to the number of defaults in the year.

10 29. The Tribunal found that paragraph 11 of Schedule 56 imposed a duty on HMRC to charge a penalty even if the payment was only one day late.

30. The Tribunal found that HMRC was acting in accordance with this legislation.

Decision

31. The appeal is dismissed and the penalty is hereby confirmed.

15 32. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**SANDY RADFORD
TRIBUNAL JUDGE**

RELEASE DATE: 7 November 2012

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